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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 709

PATSY MUTARIELLI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.

THOMAS D. McBBIDE,
Counsel for Petitioner.

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THE UNITED STATES OF AMERICA

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The petitioner, Patsy Mutarielli, by his attorney, Thomas D. McBride, respectfully presents to this Court his petition and prays that a writ of certiorari issue under the authority of Judicial Code Section 240a, 43 Stat. 938, 28 U. S. C. A. 347a, to review the judgment of the United States Circuit Court of Appeals for the Third Circuit affirming a judgment of sentence of fine and imprisonment imposed by the District Court of the United States for the Eastern District of Pennsylvania after conviction by a jury on four criminal indictments growing out of alleged violations of the Emer-

gency Price Control Act of 1942, sec. 205(b), 56 Stat. 33, as amended by sec. 108, 58 Stat. 640, 50 U. S. C. A. Appendix 925(b). The Opinion of the Circuit Court of Appeals was filed in Cause No. 8901 on November 27, 1945. This petition is filed herein on the 2nd day of January, 1946.

Statement of the Case

Petitioner was indicted by a Grand Jury sitting for the Eastern District of Pennsylvania under Indictments Nos. 12973 and 12975 (R. 10a, 25a) with violations of Revised Maximum Price Regulation No. 169, covering wholesale sales of beef (7 F. R. 10381) promulgated by the Price Administrator under the Emergency Price Control Act of 1942. (Jan. 30, 1942, c26, Title II, sec. 201, 56 Stat. 29, as amended June 30, 1944, c325, Title I, sec. 104, 58 Stat. 637, 50 U. S. C. A. Appendix 921). The various counts of the indictments charged that petitioner, on certain dates between March 13, 1944, and January 23, 1945, "wilfully and unlawfully sold and delivered, in the course of said business, to [various persons] owners and operators of retail meat stores, the defendant well knowing that the sale by him to said purchaser was for the purpose of resale by said purchaser, at retail, a certain beef wholesale cut, at a price higher than the maximum price permitted by said Revised Maximum Price Regulation No. 169 * * *."

Under Indictments Nos. 12972 and 12974 (R. 9a, 23a) petitioner was charged with violations of Maximum Price Regulation No. 355 (8 F. R. 4423) covering ceiling prices for retail sales of meat.

In Indictment 12972 it was charged that on October 13, 1944, he sold a club steak weighing one pound four ounces at sixty-eight cents per pound for a total price of eighty-five cents whereas the legal maximum price per pound was fifty-one cents (R. 9a).

In Indictment 12974, first count, he was charged with selling on June 28, 1944, a porterhouse steak weighing one pound one ounce at a price of seventy-five cents per pound for a total price of eighty cents whereas the legal maximum price was fifty-five cents per pound (R. 23a). Under the second count, he was charged with having sold on January 24, 1945, a club steak weighing one pound fourteen ounces at seventy-five cents per pound for a total charge of one dollar and forty cents, whereas the maximum price per pound was fifty-one cents (R. 24a).

On March 21, 1945, petitioner was placed on trial before the Honorable George A. Welsh and a jury, which, at the conclusion of the trial on March 29, 1945, found him guilty on some counts of each of the above indictments. On April 2, 1945, petitioner filed a Motion for New Trial (R. 221a) and a Motion in Arrest of Judgment (R. 216a). Both motions were decided adversely to petitioner's contentions without opinion, and sentence of fine and imprisonment was imposed. In due course he took his appeal to the Circuit Court of Appeals for the Third Circuit. After oral argument and presentation of briefs, in which the same questions raised in the court below were argued, the Circuit Court filed its opinion on November 27, 1945, affirming the judgment of sentence of the District Court. A copy of that opinion appears at page 230 of the Record.

With respect to the charges of violation of the wholesale price ceiling it would serve no useful purpose to outline the evidence since petitioner does not contend that the evidence was not sufficient, if believed, to sustain the charges laid in the indictments. His contention rests entirely upon the ground that at the time of his conviction there was not in effect, proved to be applicable to him, a valid Maximum Price Regulation covering wholesale sales of beef. He was convicted by the jury on March 29, 1945, at or about 5 o'clock in the afternoon but earlier in the same day, without the

knowledge of the trial judge or counsel, the Emergency Court of Appeals, in the case of *Heinz, et al. v. Chester Bowles, Price Administrator*, 149 F. 2d 277, invalidated Revised Maximum Price Regulation No. 169 as applied to non-processing slaughterers.

With respect to the retail price ceiling charges, Mrs. Violet Agran, an O.P.A. agent, testified (Count I, Indictment 12972) under examination by the United States Attorney, that on October 13, 1945, she purchased meat from petitioner as follows: (R. 59a)

"By Mr. Clary:

Q. What was the conversation with respect to what you asked for, or did you ask for anything—did you ask for a club steak, or did you ask for lamb chops, or what did you do?

A. He asked what I wanted, and I said some T-bone steaks.

He said, 'I will give you better than T-bone,' and took out something wrapped in cellophane paper.

Q. He took out what?

A. Some meat wrapped in cellophane paper, and he cut it in two slices, trimmed it well and weighed it. It came to one pound and four ounces on the scale.

Q. So that the trimming was done before the weighing?

A. That is correct.

Q. Did he do any trimming afterwards?

A. No, sir.

Q. So the pound and four ounces that you bought came to what, eighty-five cents?

A. That is right."

In support of the first count of Indictment 12974 the Government relied upon the testimony of Miss Helen Shackelford, an O.P.A. agent, who said that on June 28, 1944, she went to the store, asked Harry Sobel, an employee of petitioner (who was co-indicted with him but acquitted on this

very charge) for a T-bone steak and he answered that he did not have a T-bone steak but he did have a club steak (R. 69a). Petitioner was not present and it is not even pretended that he had any knowledge of the particular transaction. The agent continued her testimony (R. 69a):

"A. I said I would take it, and he went to the ice box and brought out a piece of meat and cut the steak from the piece of meat, and then he trimmed the meat.

Q. Had it gone on the scales?

A. He then placed it on the scales.

Q. When did he trim the meat, before or after placing it on the scales?

A. Before he placed it on the scales.

Q. Go ahead.

Q. He placed it on the scales and it weighed one pound and one ounce, and he charged me 80 cents—at the rate of 75 cents a pound."

She did not know how much trimming there was or what the weight of the steak was before he trimmed it (R. 75a). She saw him trim it (R. 78a) and in trimming it he cut some of the fat but she does not know how much (R. 79a).

The third retail ceiling violation concerns the transaction of January 24, 1945, as charged in the second count of Indictment 12974, which took place between Mrs. Violet Agran and Harry Sobel. It was not shown that petitioner was present or had any knowledge of the transaction. The circumstances of the particular sale were not substantially different from the one described immediately above.

Although with respect to the two sales last described it was not shown that petitioner had any personal knowledge of the particular transaction, petitioner did testify that Sobel was employed in the store and that petitioner fixed prices at which the meat in the store was to be sold

(R. 228a). There was no evidence that the price charged by Sobel in each of those two instances was or was not in accordance with the prices fixed by petitioner. Sobel was acquitted as to both sales and petitioner was convicted of both.

Questions Presented

1. Whether petitioner may be convicted of a violation of Maximum Price Regulation 169 on March 29, 1945, at 5 o'clock p.m., when earlier on that day such Regulation, by decision of the Emergency Court of Appeals, in another case, was held to be valid only against processing slaughterers and the evidence failed to show affirmatively that petitioner was a processing slaughterer even though on April 2, 1945, the said decision was vacated and subsequently the complaint on which the original decision was predicated was dismissed.
2. Whether, with respect to the retail sale made personally by petitioner to the agent, as charged in Indictment 12972, the evidence was sufficient to justify the conviction, in view of the fact that the weight of the fat actually and legally trimmed before weighing was not shown to have been insufficient when added to the meat received by the purchaser to warrant the price actually charged.
3. Whether petitioner may be convicted on the first and second counts of Indictment 12974 where the evidence fails to show petitioner's personal knowledge of, or joinder in, the transaction and the sale was made for a price which was not shown to have been fixed by petitioner by an employee who was himself acquitted of the charges.

Reasons Relied upon for Allowance of Writ

1. The Opinion of the Circuit Court of Appeals ignores petitioner's oral argument that Section 204(b) of the Emergency Price Control Act, providing that "the effectiveness

of a judgment of the [Emergency] court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof" is an unprecedented and unconstitutional abdication by Congress of legislative power as provided in Article I, Section 1, and Article I, Section 8, paragraph 18, of the Constitution of the United States and in violation of the direct and unequivocal holding of this Court in *Schechter Poultry Corporation v. United States*, 295 U. S. 495, 55 S. Ct. 837 and *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241.

2. The conviction of petitioner of the retail price ceiling violations presents a new and unjustified theory of vicarious criminal liability which would make an employer, whether corporate or individual, criminally liable for the acts of an employee which are in violation of price fixing provisions of the Emergency Price Control Act simply because such employer admittedly fixed prices in the particular establishment even in the absence of proof that the price so fixed was the price actually charged. This involves an important question both of substantive federal criminal law and the administration of the Emergency Price Control Act which imposed criminal liability only where the conduct is "wilfull."

3. Conviction of petitioner, without sufficient evidence to sustain it, is a fundamental violation of his rights which calls for the exercise of this Court's power of supervision.

WHEREFORE your petitioner respectfully prays that a writ of certiorari under Judicial Code sec. 240(a), 28 U. S. C. A. 347(a) be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit to certify and send to this Court for its review and determination on a day

certain to be therein named a full and complete transcript of the record and all proceedings in the cause entitled and numbered on its docket In re: United States of America v. Patsy Mutarielli, October Term, 1944, No. 8901; that the said judgment of the United States Circuit Court of Appeals for the Third Circuit affirming the judgments of sentence of the District Court of the United States for the Eastern District of Pennsylvania on Indictments Nos. 12972, 12973, 12974 and 12975, may be reversed and set aside by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

PATSY MUTARIELLI,
By THOMAS D. McBRIDE,
Attorney for Petitioner.